ATTORNEY FOR APPELLANT:

MICHAEL R. FISHER
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

SCOTT L. BARNHART
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JEROME MILLER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0512-CR-1232
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton Pratt, Judge
Cause No. 49G01-0407-FB-131362

September 12, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

KIRSCH, Chief Judge

After a bench trial, Jerome Miller was found guilty of two counts of aggravated battery[1] as a Class B felony, criminal recklessness[2] as a Class D felony, and two counts of operating a vehicle while intoxicated,[3] as a Class A misdemeanors. The following issues are dispositive:

I. Whether there is sufficient evidence to support Miller's convictions for aggravated battery.

II. Whether the trial court properly entered judgment for two counts of operating a vehicle while intoxicated.

III. Whether the trial court erred in sentencing Miller.

We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

On July 17, 2004, Ashley Biggs, Marinda Jett, and two other high school classmates stopped by a friend's house on the way to Indiana Black Expo. The girls joined some other individuals standing in the front yard of Frank Gaines.

Miller and another individual approached the group and began arguing with Gaines about a hat and an allegation that Miller had been seeing or talking to Gaines's cousin. Gaines returned Miller's hat to him and told him not to come to his house with that kind of attitude. Miller then left, appearing angry and upset.

Five to ten minutes later, Miller drove his car into the crowd of people in Gaines's front yard. Miller's car struck Biggs and Jett and pinned both underneath it. Both girls

[1] *See* IC 35-42-2-1.5.

[2] *See* IC 35-42-2-2.

[3] *See* IC 9-30-5-4. Miller was convicted of operating a vehicle with a blood alcohol content of 0.08 causing serious bodily injury. To avoid double jeopardy, the trial court, at sentencing, reduced these convictions to operating a vehicle while intoxicated.

were taken to hospital, with Biggs placed on life support due to suffering from severe head trauma. Jett was treated for serious cuts and abrasions, one of which required a skin graft. Miller fled from the scene, but later arrived at a hospital complaining of chest pains. Miller admitted to an officer at the hospital that it was his car that was involved in the incident and that he was driving it. A blood test administered at the hospital revealed that Miller's blood alcohol content was 0.089.

After a bench trial, Miller was convicted of two counts of aggravated battery as a Class B felony, criminal recklessness as a Class D felony, and two counts of operating a vehicle while intoxicated causing serious bodily injury as a Class D felony. Miller now appeals.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

When reviewing the sufficiency of the evidence, we neither reweigh evidence nor judge witness credibility. *James v. State*, 755 N.E.2d 226, 229 (Ind. Ct. App. 2001). Instead, we examine only the evidence favorable to the judgment, together with the reasonable inferences to be drawn therefrom. *Id*.

Miller first argues that there is insufficient evidence to support his convictions for aggravated battery. In regards to the injuries to Jett, he contends that the State failed to prove that her injuries constituted "serious permanent disfigurement." Miller also asserts that the State failed to prove that he acted knowingly when he caused the injuries of both Jett and Biggs.

The State charged Miller with two counts of aggravated battery as a Class B felony. Thus, in order to convict Miller of aggravated battery, the State was required to prove beyond a reasonable doubt that Miller knowingly or intentionally touched Jett and Biggs in a rude, insolent, or angry manner. IC 35-42-2-1. If such contact resulted in "serious bodily injury," then the crime becomes a Class C felony. *Id*. This crime is elevated to Class B aggravated battery if Miller inflicted upon Jett and Biggs injuries that created a substantial risk of death or caused serious permanent disfigurement or the protracted loss or impairment of the function of a bodily member or organ. IC 35-42-2-1.5. The charging information indicates that Miller was charged with knowingly inflicting injury that caused serious permanent disfigurement to Jett and that created a substantial risk of death to Biggs. *Appellant's App*. at 33.

First, Miller asserts that the State failed to prove that Jett suffered serious permanent disfigurement. We have previously noted that the phrase "serious permanent disfigurement" has not been defined by the legislature. *See James*, 755 N.E.2d at 230. Consequently, in *James*, we determined that, by using the language "serious permanent disfigurement," the legislature intended to protect against continuing or enduring injuries that mar or deface the appearance or physical characteristics of a person. *Id.*

In *James*, we found that there was sufficient evidence of serious permanent disfigurement based on the victim's testimony describing the damage done to his mouth. *Id.* Specifically, the victim testified that one of his teeth was knocked out and could not be put back into his mouth, another tooth was loosened to the point that it had to be

removed and others were broken and had to be filed down. *Id.* Further, the victim continued to have a large hole in his gum line, although he was fitted for false teeth. *Id.*

In *Salone v. State*, the defendant was convicted of two counts of aggravated battery and challenged the sufficiency of the evidence relating to the protracted impairment or disfigurement of the victims' hands. 652 N.E.2d 552, 559 (Ind. Ct. App. 1995). We found sufficient evidence of protracted loss or impairment of function where one of the victims testified that burns inflicted by the defendant rendered her unable to use her hand for fourteen to sixteen weeks. *Id.* at 559. Evidence of the second victim's injuries consisted of photographs of the victim's burned hand and the treating physician's testimony, which failed to discuss either the disfigurement or the severity or duration of functional impairment caused by the victim's burns. *Id.* We concluded that this latter evidence was insufficient to sustain the State's burden of proof on the element of disfigurement. *Id.*

Here, the State established that Jett was struck by Miller's car and was taken to the hospital to be treated for her injuries. *Tr.* at 154-55. Jett suffered from cuts and bruises along her head and arm, and had to have a skin graft to replace missing skin from her knee. *Id.* at 156. She spent one night in the hospital. *Id.* at 158. Jett testified that she still had a scar from her injury and that she would always have a scar from her injury. *Id.* at 159. We find that this testimony while sufficient to establish serious bodily injury fails to establish serious permanent disfigurement. No evidence was presented regarding the extent of any continuing or enduring disfigurement. We conclude that the evidence was

insufficient to establish this element of aggravated battery and therefore reverse Miller's conviction for this count of aggravated battery.

When a conviction is reversed because of insufficient evidence, we may remand for the trial court to enter a judgment of conviction upon a lesser-included offense if the evidence is sufficient to support the lesser offense. *Neville v. State*, 802 N.E.2d 516, 519 (Ind. Ct. App. 2004), *trans. denied*. The lesser-included offense is factually included in the crime charged if the charging instrument alleged that the means used to commit the crime included all the elements of the alleged lesser-included offense. *Id.*

IC 35-42-2-1(a)(3) provides that a person who knowingly or intentionally touches another person in a rude, insolent, or angry manner resulting in serious bodily injury to any other person commits battery as a Class C felony. Here, the State established sufficient evidence to prove that Miller committed battery as a Class C felony. Accordingly, we reverse one of Miller's aggravated battery convictions and remand with instructions to enter judgment for battery as a Class C felony and to resentence in a manner consistent with this opinion.

Next, Miller asserts that the State failed to prove that he acted knowingly when he caused the injuries to both Jett and Biggs. IC 35-41-2-2(b) provides that a person engages in conduct "knowingly" if, when he or she engages in the conduct, the person is aware of a high probability that he or she is doing so. Because knowledge is the mental state of the actor, it may be proved by circumstantial evidence and inferred from the circumstances and facts of each case. *Wilson v. State*, 835 N.E.2d 1044, 1049 (Ind. Ct. App. 2005), *trans. denied*.

Here, evidence was presented that Miller had been arguing with Gaines immediately prior to Miller driving his car into the gathering at Gaines's house. *Tr.* at 50-55. There was also evidence of a diagnostic test performed on Miller's car, which demonstrated that his brakes and steering were in working order. *Ex.* 36 at 585. An accident reconstructionist testified that there were no signs of tire marks, yaw marks,[4] or skid marks at the crash scene. *Tr.* at 318-19. These marks would have been evidence that Miller may have been trying to brake or that the car was either sliding or was out of control. *Id.* Given this evidence, it was reasonable for the trial court to have found, beyond a reasonable doubt, that Miller was aware of a high probability that his conduct would lead to a serious bodily injury, including the injuries to Jett and Biggs. Thus, the evidence is sufficient to sustain Miller's convictions for both aggravated battery and battery reduced to a Class C felony.

II. Operating While Intoxicated

Miller maintains that the trial court erred in entering judgment and sentencing him to operating a vehicle while intoxicated because it is not a lesser-included offense of operating a vehicle with a blood alcohol content ("BAC") of 0.08 causing serious bodily injury. We agree.

According to the charging information, Miller was charged pursuant to IC 9-30-5-4(a)(1) with two counts of operating a vehicle with a BAC of greater than 0.08 causing serious bodily injury. Specifically, the charges stated:

> Jerome Miller, on or about July 17, 2004, did cause serious bodily injury . . . to another person . . . when operating a motor vehicle . . . with an alcohol

[4] "Yaw marks" were described as marks made "when a tire is rolling and sliding at the same time." *Tr.* at 318.

> concentration equivalent to at least eight-hundredths (0.08) gram of alcohol per one hundred (100) milliliters of his or her blood, or at least eight-hundredths (0.08) gram of alcohol per two hundred ten (210) liters of his or her breath.

Appellant's App. at 109.

Miller was found guilty of both counts of operating a vehicle with a BAC of greater than 0.08 causing serious bodily injury. At sentencing, the trial court, because of double jeopardy concerns, reduced his convictions to operating a vehicle while intoxicated as a Class A misdemeanor, which was stated to be a lesser-included offense of operating a vehicle with a BAC of 0.08 causing serious bodily injury. *Id.* at 23.

An "included offense" has been defined by the General Assembly as an offense that:

> (1) is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged;
> (2) consists of an attempt to commit the offense charged or an offense otherwise included therein; or
> (3) differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability, is required to establish its commission.

IC 35-41-1-16.

In order to be convicted of operating a vehicle while intoxicated as a Class A misdemeanor pursuant to IC 9-30-5-2, a defendant must have been found to have 1) operated a motor vehicle, 2) while intoxicated, 3) in a manner that endangers a person. IC 9-30-5-2 is an inherently included offense of IC 9-30-5-4(a)(3) which defines the offense of operating a motor vehicle while intoxicated causing serious bodily injury. The only element distinguishing these two offenses is the degree of harm. Because one

cannot cause serious bodily injury to another without endangering the other, we conclude that IC 9-30-5-2 is inherently include in the offense of operating a motor vehicle while intoxicated causing serous bodily injury pursuant to IC 9-30-5-4(a)(3).

Here, though, Miller was not charged with violating IC 9-30-5-4(a)(3). Rather, he was charged and convicted pursuant to IC 9-30-5-4(a)(1) of operating a motor vehicle with a BAC greater than 0.08 causing serious bodily injury. To be convicted under this section, a defendant must have been found to have 1) operated a motor vehicle, 2) with a blood alcohol concentration of at least 0.08, 3) casing serous bodily injury. There are two distinguishing elements between these statutes: the degree of harm, as above, and the requirement of a BAC of 0.08 versus intoxication.

To determine whether a Class A misdemeanor conviction under IC 9-30-5-2 is an included offense of IC 9-30-5-4(a)(1), we have to determine whether proof of having a blood alcohol concentration of 0.08 or above establishes proof of intoxication. In *Warner v. State,* 497 N.E.2d 259 (Ind. Ct. App. 1986), we held that proof of a BAC of 0.10 did not establish that the driver was intoxicated for the purposes of driving while intoxicated. Conversely, in *Miller v. State*, 641 N.E.2d 64 (Ind. Ct. App. 1994), *trans. denied*, we held that proof of intoxication did not require proof of BAC. Accordingly, we hold that proof of a BAC of 0.08 is not, in and of itself, sufficient to establish proof of intoxication, that the offense of operating a motor vehicle while intoxicated in a manner that endangers a person is not an included offense of operating a motor vehicle with a BAC of 0.08 causing serous bodily injury, and that the trial court erred in entering judgment and

sentences for two counts of operating a motor vehicle with intoxicated as Class A misdemeanors.

The appropriate lesser included offense here is operating with a BAC of 0.08, a Class C misdemeanor, pursuant to IC9-30-5-1. The elements are identical to IC 9-30-5-4(a)(1) except for the degree of harm, and it is an inherently included offense. According, we vacate Miller's two convictions for operating a motor vehicle while intoxicated as Class A misdemeanors, and remand with instruction to enter judgment for one count[5] of operating a motor vehicle with a BAC of 0.08 or higher as a Class C misdemeanor.

III. Sentencing

Miller next argues that the trial court abused its discretion in sentencing him to consecutive sentences, and in failing to consider all proper mitigating circumstances. Miller also maintains that his sentence is inappropriate in light of the nature of the offense and his character.

In *Rodriguez v. State*, 785 N.E.2d 1169, 1179 (Ind. Ct. App. 2003), *trans. denied*, we found that when considering the appropriateness of the sentence for the crime committed, courts should initially focus upon the presumptive penalties. *See also Hayden v. State*, 830 N.E.2d 923, 928 (Ind. Ct. App. 2005), *trans. denied*. Trial courts may then consider deviation from this presumptive sentence based upon a balancing of factors that must be considered pursuant to IC 35-38-1-7.1(a), together with any

[5] Miller contends that his convictions and sentences for two counts of operating while intoxicated violate double jeopardy principles. He is correct. While convictions for two counts of operating with a BAC of 0.08 or higher causing serious bodily injury do not violate double jeopardy principles where there are separate victims, reducing the offense to a Class C misdemeanor does not implicate double jeopardy concerns.

discretionary aggravating and mitigating factors found to exist. *Hayden*, 830 N.E.2d at 928; *Rodriguez*, 785 N.E.2d at 1179. In order for a trial court to impose enhanced or consecutive sentences, it must (1) identify the significant aggravating factors and mitigating factors; (2) relate the specific facts and reasons that the court found those aggravators and mitigators; and (3) demonstrate that the court has balanced the aggravators with the mitigators. *Hayden*, 830 N.E.2d at 928; *Bostick v. State*, 804 N.E.2d 218, 224-25 (Ind. Ct. App. 2004). As well as reviewing the traditional balancing of aggravating and mitigating factors, we may, under Article VII, Section 6 of the Indiana Constitution, review and revise sentences to ensure that they are proportionate in light of the nature of the offense and character of the offender. *See* Ind. Appellate Rule 7(B); *Hayden*, 830 N.E.2d at 928; *Foster v. State*, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003), *trans. denied*. We also note that a single aggravating factor is sufficient to support the imposition of enhanced or consecutive sentences. *Hayden*, 830 N.E.2d at 929; *Jones v. State*, 807 N.E.2d 58, 69 (Ind. Ct. App. 2004), *trans. denied*.

Here, the trial court found as an aggravating circumstance that Miller had a history of delinquent activity, specifically possession of marijuana. *Tr.* at 408. The trial court then mentioned that this was significant because both that and the present offense were substance abuse related offenses. *Id.* As mitigating circumstances, the trial court considered Miller's remorse and his lack of criminal history. *Id.* The trial court then stated "The Court, being mindful of a U.S. Supreme Court case ***Blakely versus Washington***, is going to find that the aggravators and mitigators balance," and went on to sentence Miller to the presumptive sentence for each offense. *Id.* at 408-09 (emphasis in

original). After addressing each specific offense, the court, "because of the senseless and violent nature of the offenses, and the fact that all involved three separate victims," decided that Miller's sentences should run consecutively. *Id.* at 410.

Miller argues that because the trial court stated that, "being mindful of a US Supreme Court case ***Blakely versus Washington***, is going to find that the aggravators and mitigators balance," *Id.* at 408, it was an abuse of discretion to then order his sentences to run consecutively. *See Wentz v. State*, 766 N.E.2d 351, 359 (Ind. 2002) (finding that when the trial court finds the aggravating and mitigating circumstances to be in balance, there is no basis on which to impose consecutive terms). However, *Wentz* can be distinguished by the fact that the trial court, here, found two additional aggravators, which it then used to order Miller's sentences to run consecutively. Given that our Supreme Court has previously noted that the existence of multiple victims can justify the imposition of consecutive sentences, *see Estes v. State*, 827 N.E.2d 27, 29 (Ind. 2005), we find no abuse of discretion in ordering that Miller's sentences run consecutively.

Miller next maintains that the trial court abused its discretion by failing to give proper weight to his proffered mitigators. Specifically, Miller contends that the trial court should have considered the fact that his incarceration would be a hardship on his mother, and that, while in jail awaiting trial, he participated in programs for substance abuse, job skills training, anger management, and parenting skills. *Appellant's Br.* at 19. He also alleges that the trial court should have considered his youth at the time of the commission of the offense and that he worked "diligently with the jail chaplain" while incarcerated. *Id.*

The finding of mitigating circumstances is not mandatory and rests within the trial court's discretion. *Moyer v. State*, 796 N.E.2d 309, 313 (Ind. Ct. App. 2003). The trial court has the discretion to determine the existence of and the weight given to a mitigating circumstance. *Id.* The trial court is not required to accord the same weight to a mitigating circumstance as would the defendant. *Id*. Additionally, the trial court need not consider a mitigating circumstance that is highly disputable in nature, weight, or significance. *Id.* The trial court did not abuse its discretion in weighing Miller's proffered mitigators.

Miller also argues that his sentence is inappropriate in light of the nature of his offenses and his character. We disagree.

As noted above, Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

Miller, after becoming angry over a dispute about a hat, decided the appropriate response was to drive his car into a group of bystanders, thus seriously injuring two individuals. There was no evidence at the scene that he tried to brake or slow the vehicle in any way before hitting the victims. One of his victims suffered from a very serious brain injury, which left her unable to do anything for herself. Miller, although a minor, was driving with a BAC of 0.08. The trial court was correct in finding this reaction to be "senseless and violent." *Tr*. at 409. After due consideration of the trial court's decision,

we cannot say that the sentence imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender.

IV. Conclusion

We affirm the conviction of one count of aggravated battery as a Class B felony. We reverse one of Miller's aggravated battery convictions and remand with instructions to enter judgment for battery as a Class C felony and to resentence in a manner consistent with this opinion. We further remand with instructions to vacate the convictions of operating a vehicle while intoxicated and, instead, to enter judgment for one count of operating a vehicle with a BAC of 0.08 and resentence Miller consistent with that offense.

Affirmed in part, reversed in part, and remanded with instructions.

BAILEY, J., and CRONE, J., concur.